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In The Supreme Court Of The United States

OCTOBER TERM, 1993

ANITA GALLAGHER, PAUL B. GALLAGHER AND LAURENCE M. HECHT,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the conviction of petitioners for violations of the Virginia Securities Act, arising from their solicitation of loans to support the exercise of core First Amendment activities by the political movement to which they belonged, deny petitioners due process of law, where, prior to the indictment, unsecured, simple interest promissory notes had never been held to be "securities" by any court?

2. Did petitioners' convictions for violations of the Virginia Securities Act in connection with the solicitation of loans to fund core First Amendment activities violate their Constitutional rights, where application of that regulatory scheme would create an intolerable burden on the exercise of those rights?

3. Does the existence of extensive and inflammatory pretrial publicity on a national scale, to which the prosecuting authority has directly contributed, require content based voir dire to assure a fair and impartial jury, when the trial judge can not know the scope of the publicity to which the jurors have been exposed?

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1993

NO. _____

ANITA G. GALLAGHER,
PAUL B. GALLAGHER and
LAURENCE M. HECHT,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE VIRGINIA SUPREME COURT

The Petitioners, Anita G. Gallagher, Paul B. Gallagher and Laurence M. Hecht, respectfully requets that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court, entered in the above-entitled proceedings on July 30, 1993.

OPINIONS BELOW

The Virginia Supreme Court's unpublished denials of petitioner's petition for appeal and petition for rehearing are reprinted in the Appendix. (App. 1a, 30a)[1]. The Virginia Court of Appeals' unpublished per curiam opinion affirming petitioners' convictions is also reprinted in the Appendix. (App. 2a).

STATEMENT OF JURISDICTIONAL GROUNDS

The Virginia Supreme Court denied petitioners' request for a rehearing on July 30, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

APPLICABLE PROVISIONS OF LAW

1. Virginia Code Sections 13.1-501, 13.1-502, 13.1-504 - 510, 13.1-513, 13.1-514,

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[1] Materials cited as "App. 1a" and following are contained in volume "A" of the appendix under separate cover. Materials cited as "App. 1b" and following are contained in volume "B" of the appendix under separate cover.

13.1-514.1, 13.1-520, 18.2-178 are reprinted in pertinent part in the Appendix. (App. 31a).

2. Virginia Securities Act Rules 215, 300, 304 and Agreement for Inspection of Records are reprinted in pertinent part in the Appendix. (App. 59a).

3. Title 15, United States Code, Sections 77b and 77x are reprinted in pertinent part in the Appendix. (App. 66a).

4. 7B, Uniform Laws Ann., Sections 401, 409 are reprinted in pertinent part in the Appendix. (App. 68a).

5. United States Constitution, First, Fifth, Sixth and Fourteenth Amendments are reprinted in the Appendix. (App. 69a).

STATEMENT OF THE CASE

A. The Proceedings Below

In February, 1987, the petitioners were indicted separately on multiple counts of securities fraud involving the

issuance of unsecured, simple interest promissory notes in exchange for loans for political advocacy purposes. The indictments were amended in August, 1988. Petitioners agreed to be tried jointly and a jury trial commenced in the Circuit Court of Roanoke County on November 5, 1990. On January 7, 1991, the jury returned verdicts of guilty as to all counts. On March 28, 1991, the trial court sentenced Anita Gallagher to 39 years, Paul Gallagher to 34 years and Laurence Hecht to 33 years imprisonment.

Petitioners timely appealed their convictions to the Virginia Court of Appeals, asserting fifteen assignments of error. The court granted the appeal as to three of the assigned errors. On December 15, 1992, the court affirmed the convictions in an unpublished per curiam decision. (App. 2a).

Petitioners further appealed their convictions to the Virginia Supreme Court. That appeal was denied on June 25, 1993 (App. 1a), and a petition for rehearing before that court was denied on July 30, 1993 (App. 30a).

Each of the issues presented here was presented to the trial court. Each issue was also presented to the Virginia Court of Appeals in a petition for appeal. The due process claim, as to which the Court granted the writ, was then argued to that court on the merits. Each of the issues presented here were then presented to the Virginia Supreme Court in a petition for writ of error.

B. The Facts In This Case

1. The Due Process/First Amendment Issues

Petitioners are members of the National Caucus of Labor Committees

(NCLC), a movement dedicated to political and cultural change based upon the ideas and programs of Lyndon H. LaRouche, Jr.. The NCLC operated several corporate entities, including Caucus Distributors, Inc., a non-profit distribution company for political literature, and the Fusion Energy Foundation, a non-profit foundation promoting NCLC's scientific and economic views and programs. They financed their work through fundraising directed towards people who had expressed support for their political, social, economic and cultural agenda. The various advocacy campaigns undertaken by petitioners and other NCLC members ware financed by solicitation of individuals who had expressed support for their views on political, social, economic and cultural issues. This fundraising included contributions, loans which were evidenced by unsecured, simple interest

promissory notes, and the sale of subscriptions to movement publications.

No loans were solicited from any persons who had not received and read the movement's literature. (App. 18b). Furthermore, the purposes for which loans were solicited changed as different activities, events, and campaigns became the priority in the movement's political agenda. The Commonwealth's undercover agent testified at trial that the political nature of the entities was practically "pushed down your throat" by the solicitors. (App. 89b-90b).

The Commonwealth's own witnesses testified repeatedly that they were motivated, at least in significant part, by political considerations. (App. 29b-37b, 40b-41b, 46b-50b, 56b-57b, 61b-67b). Lenders provided funds for specific political purposes, including sponsorship

of civil rights marches and lobbying efforts. (App. 63b-65b).

The loans at issue in the indictments occurred between July, 1984 and December, 1986 (Paul Gallagher), January, 1985 and September, 1985 (Laurence Hecht) and July, 1984 and September, 1985 (Anita Gallagher).

On January 23, 1986, an investigator from the State Corporation Commission (SCC) wrote to Caucus, describing its loans as an "investment opportunity" which "may constitute a security." (App. 1b). The attorney for Caucus wrote to the SCC investigator on March 5, 1986, asserting that the notes in question were not securities, providing copies of notes, describing Caucus and the purpose of the loans, and noting the existence of serious First Amendment implications. He offered to answer any questions or provide further

information. (App. 2b-3b). The SCC did not respond to the letter from Caucus' attorney.

Petitioners were indicted on February 17, 1987. On February 19, 1987, the SCC held a hearing to determine whether a restraining order should be issued, preventing Caucus from continuing to solicit loans because the notes were unregistered securities. The Securities Director of the SCC also testified that his division did not even claim the notes were securities until shortly before this hearing.The SCC Chairperson stated at the hearing that "This is a case of 'first blush' to the Commission." (App. 4b). The SCC took the issue under advisement, requesting further briefs from the parties. Ultimately, the SCC conceded that "this is a case of first impression in Virginia" and that a "review of federal

court decisions reveals an admitted lack of clarity about the proper analysis to be used in determining whether a given instrument comes within the definition of a security." (App. 7b). All of the notes at issue in the criminal indictments preceded the concededly novel decision of the SCC that simple interest, unsecured promissory notes were securities.

2. The Voir Dire Issue

Prior to petitioners' trial, there was extensive publicity from the local and national media concerning the cases against petitioners and other related defendants. Altogether, 46 of the 63 venirepersons questioned in this case had heard of, or come into contact with, LaRouche or his political movement. Of the panel of 24 from which the jury was selected, 16 had had such contact.

The sources of the publicity were

many and varied. One juror remembered hearing about LaRouche in the national news on television and in a national magazine. (App. 16b). Another juror had heard LaRouche described as an extremist in the media. (App.17b). A third juror had heard stories on National Public Radio regarding LaRouche, some of his associates, fraud and telephone solicitations. (App. 15b). Other jurors had heard of LaRouche through the television news (App. 12b-14). One juror had also lived in Loudoun County, where the movement was headquartered, and had heard of LaRouche when he was living there. (App. 12b-13b)[2]

The prosecutors and law enforcement personnel had directly contributed to the

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[2] Venue was changed from Loudoun county in these cases due to excessive publicity, following the conviction of one of petitioners' co-defendants.

publicity in this case. They had appeared on national news and news magazine programs to discuss the cases, using highly inflammatory language. (App. 73b-78b). In addition, the Attorney General, whose assistant was the chief prosecutor, made the successful prosecutions of petitioners and their codefendants a campaign issue, including it in her campaign literature. (App. 83b-86b).

REASONS FOR GRANTING THE WRIT

I. PETITIONERS' INDICTMENT AND CONVICTION FOR SECURITIES FRAUD VIOLATED THE NOTICE REQUIREMENT OF THE DUE PROCESS CLAUSE, SINCE THERE WAS PERVASIVE UNCERTAINTY AS TO WHETHER UNSECURED PROMISSORY NOTES WERE SECURITIES, AND THE NOTES WERE ISSUED TO SUPPORT THE EXERCISE OF CORE FIRST AMENDMENT ACTIVITIES.

It is axiomatic that a criminal conviction may not stand where the defendant was not on notice, prior to the acts underlying his conviction, that his conduct was, in fact, illegal. E.g.,

People v. Dempster, 396 Mich. 700, 242 N.W.2d 381, 1976)(requirement of fair notice applies to state securities laws). While "the general rule that ignorance of the law or a mistake of law is no excuse to a criminal prosecution is deeply rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), it is equally true that the Due Process Clause of the Fourteenth Amendment incorporates notions of fair notice or warning, Smith v. Goguen, 415 U.S. 566, 572 (1974), and prohibits states from using a criminal prosecution as a "vehicle to decide [a] pioneering interpretation" of its statutes. United States v. Critzer, 498 F.2d 1160, 1164 (4th Cir. 1974); also, United States v. Mallas, 762 F.2d 361, 365 (4th Cir. 1985); generally, Bouie v. Columbia, 378 U.S. 347 (1964).

[T]he Constitution mandates that

> "before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable [must] be prohibited with sufficient specificity to forewarn of the proscription of said conduct."

United States v. Colon-Ortiz, 866 F.2d 6 (1st Cir.), cert. denied, 490 U.S. 1051 (1989), quoting United States v. Anzalone, 766 F.2d 676, 678 (1st Cir. 1985). Where the result obtained would violate fair notice if effectuated by legislative action, "'the [due process] violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute.'" Bouie v. Columbia, 378 U.S. at 354-55 (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679-80 (1930)).

These principles must be applied with particular vigilance where, as here, the

"statute's literal scope ... is capable of reaching expression sheltered by the First Amendment...." Smith v. Goguen, 415 U.S. at 573. In such circumstances, the vagueness proscription inherent in the Due Process Clause, and its corollary, the notice requirement, "demand[] a greater degree of specificity than in other contexts." Id. Also, Smith v. California, 361 U.S. 147, 151 (1959). That vigilance is all the more essential when the statute, or its interpretation by the state courts, eliminates scienter as an element of the offense. Smith v. California, 361 U.S. at 151-52.

Each of the principles described above applies to the prosecution of these petitioners. The prosecution was premised on acts which occurred prior to any judicial or administrative interpretation of the relevant language in the Virginia

statute; judicial interpretations of comparable provisions under the federal securities act supported petitioners' position that the Act did not apply; even after the allegedly criminal acts had been committed, the agency charged with administrative enforcement of the Act conceded a lack of clarity in the statute; the statute's literal scope could and did reach protected First Amendment activities; and the state court interpretation of the statute in petitioners' own case eliminated the element of scienter from the crime.

The evidence at trial established conclusively that the statute could, and did, reach "expression sheltered by the First Amendment." The activities for which petitioners and their co-defendants were prosecuted involved the solicitation of funds to support the various activities

of the political-philosophical movement to which they belonged. Those activities were core First Amendment activities, including, advocacy on behalf of political candidates, the publication of books and magazines on current political, social, scientific and economic issues, critiques of government policies and programs, and the publication of a weekly newspaper firmly anchored in the movement's view of world politics, economics and social and cultural institutions. See, FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 251 (1986); Buckley v. Valeo, 424 U.S. 1, 14, 44-45 (1976).

The Commonwealth's own evidence established that loans were not solicited from persons who had not received and **read** the movement's literature. The solicitation of loans always occurred in the context of discussions between a

political supporter and a fundraiser concerning priority political projects within the movement's agenda, priorities which changed with political events. Notes were issued in exchange for loans to sponsor, among other overtly political activities, a civil rights march in Washington, D.C., a political conference, lobbying activities and advocacy on behalf of the Strategic Defense Initiative and the development of fusion energy. Lenders testifying on behalf of the Commonwealth, conceded that they gave money specifically for political purposes, sometimes lending money on one issue, but not another, consistent with their own political convictions. To establish the element of fraud at trial, the Commonwealth repeatedly relied on the comment made in some solicitations that putting funds in the movement was "safer than the banks."

(App. 19b-21b). This statement, however, made prior to the collapse of the Savings & Loan industry, was specifically made in the context of discussions expressing LaRouche's view that American financial institutions were bankrupt and in grave danger of collapse. (App. 21b-24b). According to the Commonwealth's lead witness, a former movement fundraiser, this ironical statement underscored the precariousness of the banking system by comparing it to the financial condition of the political movement. (App. 22b-24b). This is only the most dramatic demonstration that the statute under which petitioners were convicted can, and did, reach "expression sheltered by the First Amendment."

In connection with this prosecution, the Commonwealth has never been able to cite a single decision predating the acts

for which petitioners were prosecuted, from any court, state or federal, holding that unsecured, simple interest, promissory notes, which do not bestow ownership interest in any enterprise or activity, are securities, under either the Virginia Securities Act or the Federal Securities Act, or any other state securities statute. Nor has the Commonwealth been able to cite any such case decided before petitioner's indictment, in February, 1987. Worse yet, the Chairwoman of Virginia's State Corporation Commission, the agency charged with enforcement of the Securities Act, when requested to issue a cease and desist order only days after the issuance of the indictments, noted that the question of whether the notes at issue in this case were securities was one of "first blush," as a result of which the Commission

continued the matter for further briefing. Further, the Commission's opinion after the issuance of the indictments, aided by that additional briefing, conceded that "[t]his is a **case of first impression** in Virginia," and that "[a] review of federal court decisions reveals an admitted lack of clarity" about how to determine if a note is a "security." (App. 4b, 7b). This uncertainty, however, did not prevent the Commonwealth from convicting these petitioners of "knowing and willful" violations of that very statute or from sentencing them to prison terms of 33 to 39 years.

In fact, at the time the underlying acts were committed and the indictments secured, the law in the Fourth Circuit and the Eastern District of Virginia under the comparable federal statute indicated strongly that these unsecured promissory

notes were not securities. In Lawler v. Gilliam, 569 F.2d 1283 (4th Cir. 1978), the Court had held that the economic reality test enunciated in SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) was the appropriate test for determining whether notes are securities. Under Howey an instrument is a security if it represents:

> (1) an investment (2) in a common venture (3) with a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others. If an instrument fails to meet any one of the four elements of this test, then the instrument is not a `security.'

Epic Mortgage Insurance Litigation, 701 F.Supp. 1192, 1248 (E.D. Va. 1988), aff'd in part, rev'd in part, 910 F.2d 118 (1990) (emphasis added). The notes at issue here failed not just one element, but all of the elements, of the Howey test. There was no "common venture," nor

reasonable expectation of profits, and "profits" were not to be derived from the entrepreneurial or managerial efforts of others.[3]

Furthermore, according to Virginia's federal courts, fixed interest on a note under Howey did not make that note a security. Epic Mortgage Insurance Litigation, 701 F.Supp. at 1249; see,

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[3] There could have been no reasonable expectation of profit by many of the lenders. Literally thousands of the promissory notes issued were at 0% interest. Anita Gallagher was specifically convicted of a count involving a loan which the lender characterized as a "repayable contribution." This lender, according to his own testimony, was completely aware of the risks involved, provided the money to advance political goals, and hoped for repayment on the basis of the ability to broaden the base of political support. (App. 68b-71b). Another lent money to support a civil rights march. This is not the stuff from which profits are expected, or of which securities are made, and certainly no one could have been on notice that they would fall within the definition of a security.

also, Union Planters National Bank v. Commercial Credit Business Loans, 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981). However, both the SCC and the Commonwealth, in its proof at trial, relied on the simple interest rates on some notes to prove an investment or profit motive by the lenders.

Even more specifically, the local federal court had held in Principe v. McDonald's Corp. 463 F.Supp. 1149 (E.D.Va. 1979) that notes which were not negotiable, conferred no voting rights and did not appreciate in value, were not securities under either the Virginia or federal statutes. Of course, each of those characteristics applied to the notes at issue here. Indeed, a neighboring district court had held that "garden variety common law promissory notes," which these notes most clearly were, were

not securities. Oliver v. Bostetter, 426 F.Supp. 1082, 1085 (D.Md. 1977).

Faced with the fact that existing case law suggested that these notes were not securities, the Virginia courts finessed the due process obstacle by noting that the statutory language referred to "any note" as a security. (App. 2a, 1a). This argument, however, avails the Commonwealth little. The statute itself includes as prefatory language that a note is a security "[u]nless the context otherwise requires." Thus, by definition, **not** all notes are securities under the Virginia Act, the exact conclusion reached by the federal courts relative to their interpretation of the identical provision in the federal securities act. E.g. Oliver v. Bostetter, supra, ("despite the 'any note' language [in a security statute] ... not every note

is a security.") The Virginia courts simply ignored the hesitancy of the State's own regulatory agency, charged with administering the statute, to classify these notes as securities.[4]

Although the felony provisions of the Virginia Securities Act, as opposed to those in federal law, require proof that the defendant "knowingly and willfully" offered or sold securities, or failed to register, the State courts, in connection with these prosecutions, eliminated any scienter requirement. The trial judge refused an instruction tendered by petitioners that, to be convicted, the jury had to find that they knew that the notes were securities. The Court of Appeals affirmed that denial, holding that

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[4] If, indeed, any note is a security, there could have been no such hesitancy by the SCC.

such knowledge was not required by the statute and that "knowingly" meant only to that the act was not accidentally done. (App. 10a). In fact, each petitioner was convicted of one count of "knowingly and willfully fail[ing] to register as a broker dealer, with the intent to defraud," the "intent" element of which logically could not exist unless the defendant had known of a requirement to register. Even as to that count, however, the Virginia courts held that such knowledge was not an element of the offense.

In the absence of a scienter requirement, stricter standards must apply to a due process analysis of

> a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

Smith v. California, 361 U.S. at 151, citing Winters v. New York, 333 U.S. 507, 509, 510, 518 (1948). Thus, petitioners were convicted

- in the absence of a definitive interpretation of applicable law;

- in the face of contrary interpretations of the same statute or identical statutory language;

- when the very agency charged with interpreting and enforcing the law was uncertain of its application to the transactions at issue; and

- in the absence of a scienter requirement;

for a violation of a statute that both on its face, and as applied to these petitioners, implicated core First Amendment expression.

Even under a lesser standard of scrutiny, the lack of notice apparent here would violate the notice requirements of the Due Process Clause. Under the higher standard of First Amendment scrutiny which

these facts require, however, these convictions fail to meet the requirements of the Constitution. The decision of the Virginia Court of Appeals, affirmed by the Virginia Supreme Court, denying petitioners' due process challenge, rejects and undermines the longstanding decisions of this Court, and can not stand if the laws of the states are to be applied equally and fairly to politically unpopular criminal defendants.

II. THE PETITIONERS' CONVICTIONS VIOLATE THE FIRST AMENDMENT BECAUSE APPLICATION OF THE STATE'S REGULATORY SCHEME FOR SECURITIES CREATES AN INTOLERABLE BURDEN ON THE EXERCISE OF CORE FIRST AMENDMENT RIGHTS.

If the criminal anti-fraud provisions of the Virginia Securities Act under which petitioners were convicted can be applied to these loans, then the entire Act must be applied. Application of this entire regulatory scheme, however, infringes upon

the First Amendment rights of: (a) solicitors (through registration requirements for "broker-dealers") or "agents;" (b) the entities receiving political loans (through registration requirements for "securities"); and (c) lenders (through compulsory disclosure of personal data of "customers" under the statute and regulations). The statutory scheme also does not afford the procedural due process required by this Court's First Amendment decisions.

The intolerable burden on the exercise of First Amendment rights inherent in the application of securities laws to type of political fundraising at issue here is readily apparent from the practical implications of complying with these laws.

Where, as here, political loans are sought on different issues at different

times, depending on a shifting political landscape, each such campaign would require separate registration of the intended notes as securities by the "issuer" involving all of the form filing, fees and disclosures specified in §§13.1-508-510. (App. 39a-49a). Further, all political fundraisers seeking loans, whether as broker-dealers or agents, would have to qualify themselves as securities dealers by taking and passing examinations for that profession. This is an absurdity, eliminating the type of volunteer fundraising activities common to political organizations, virtually forcing people to assume a new profession in order to take political loans. (App. 59a-66a). The financial records of the political organizations would be open to inspection by the state at all times and information on political supporters providing loans,

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including personal data and beliefs, would be required to be kept and subject to inspection. (App. 61a-65a).

Since the SCC can withhold registration of securities, broker-dealers or agents, and issue stop orders without any provision for immediate review by the courts, these burdens effect a prior restraint on speech. Exemption from registration requirements under §13.1-514.1(b) (App. 56a-57a), similarly allows the SCC unbridled discretion when the statute is applied in the context of political loans, a discretion which is impermissible under this Court's holdings concerning the procedural due process necessitated by the First Amendment. Riley v. National Federation of the Blind, 487 U.S. 781, 801-02 (1988); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1988).

This Court has not hesitated to prohibit governmental regulation of activities which truly do implicate the First Amendment rights of the participants, even when the regulations are directed at specific activities devoid, on their face, of First Amendment import. In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Court prohibited the Board's exercise of jurisdiction over religious schools. Although the jurisdiction of the Board would have been limited to labor, not religious, matters,

> "[t]he resolution of [unfair labor] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading

to findings and conclusions." (Emphasis added).

Id. at 502. See, also, Meek v. Pittenger, 421 U.S. 349 (1975)(striking down government support to secular educational activities in religious schools); Simon & Schuster v. Crime Victims Bd., 112 S.Ct. 501 (1991)(striking down "Son-of-Sam" law). Similarly, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-231 (1987), the Court struck down a content based tax scheme because it would have required the authorities to examine the contents of publications to determine if they were subject to taxation.

To justify a regulatory scheme which burdens political speech, the State must show a compelling state interest. FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. at 251-52, 256; Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960).

Application of Virginia's security regulation scheme to efforts by political or religious organizations to raise funds to support their core First Amendment activities would necessarily include a detailed examination of the content of the statements of fundraisers to potential lenders. In this case, regulators would have had to approve the statement that the organization is "safer than the banks," even though that statement was concededly made only as political commentary on the country's economic instability.[5] They could examine the "accuracy" of the contents of the organization's

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[5] Curiously, in oral argument before the Court of Appeals, the Attorney General denied that the SCC would regulate such statements, even though that statement was used in this prosecution as evidence of fraud. The Attorney General's implausible denial indicates that even she recognized that such regulation would be violative of the First Amendment.

controversial book on the drug trade, *Narcotraffico*, or the statements of fundraisers as to their view of world politics. Clearly, the First Amendment could not tolerate such content examination as part of a regulatory scheme. See, Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1234-35 (4th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

Of course, none of this means that the state must tolerate fraud by religious or political fundraisers, since true fraud can be prosecuted under the state's regular criminal fraud provisions. See, Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); see, also, (App. 58(a) - Virginia's fraud by false pretense statute. However, "[e]ven for proper purposes, when First Amendment protections are at risk, the state must use the least restrictive means to achieve its

objectives". Buckley v. Valeo, 424 U.S. 1, 64-66, 70-71, 74 (1976). The use of regular fraud provisions for prosecution, where appropriate, avoids the intolerable governmental intrusion inherent in subjecting political fundraisers to intrusive and burdensome regulatory schemes, developed for an entirely different profession, such as that contained in the securities laws.

The Securities Act, designed to regulate traditional commercial activities, is emphatically not the least restrictive means to achieve the Commonwealth's alleged purpose, in these prosecutions -- prevention of fraud. Its requirements impose undue and unconstitutional burdens on otherwise protected activities - solicitations of loans for political purposes, absent fraud. As noted previously, the Act and

the rules under it would require disclosure of the names of all lenders, the amounts of all loans and communications related to them -- **all of which would be subject to publication or state inspection.** Va. Code §§13.1-505(A)(2), 518(B), 524 (App. 31a); SCC Rules 200(B)(4), 301 (A)(1), 302(A), 302(B)(4). Such disclosure requirements place a heavy burden on the exercise of First Amendment rights.[6] Bates v. City of Little Rock, supra.

The SCC could "freeze future protected speech either on the basis of past misrepresentation . . . or on the basis of a past failure to comply with

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[6] The Commonwealth explicitly argued at trial that the evidence shows "a deliberate attempt on the part of these defendants to avoid the requirements of the [VSA], specifically the disclosure that comes along with registration." (App. 2695).

statutory requirements unrelated to speech", Va. Code § 13.1-506 (1,5,7), even though a state may "not enjoin future protected speech in order to punish past unprotected speech." Telco Communications, Inc. v. Carbaugh, 700 F.Supp. 294, 300 (E.D.Va. 1988), aff'd in part and rev'd in part, 885 F.2d 1225 4th Cir. 1989), cert. denied, 495 U.S. 904 (1990). It could prohibit fundraisers, as "broker-dealers," from making "unsuitable recommendations" to its lenders, or from using "any nonfactual data, material or presentation based upon conjecture, unfounded or unrealistic claims or assertions." SCC Rule 305 (A)(3), 18. Prior censorship such as that is the least compatible with First Amendment interests. Brown v. Hartlage, 456 U.S. 45, 61 (1982); Telco Communications, Inc. v. Carbaugh, 885 F.2d at 1233-34; see, Nebraska Press

Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

The SCC is granted broad prior restraint powers and the registration of securities does not become effective until the SCC so orders. VA. Code §13.1-510 (a, b, d). This would, for example, require prior identification of the purposes for which funds will be spent, Va. Code §13.1-510 (b)(9), which is also incompatible with First Amendment interests. Talley v. California 362 U.S. 60, 64-66 (1960); FEC v. Massachusetts Citizens for Life, Inc. 479 U.S. at 260-262. The SCC could use its stop order powers to restrain fundraising based upon any failure of the organization to furnish any requested information. Such powers would impermissibly restrain future speech because of past wrongdoing, related or unrelated, to speech. Telco Communications, Inc. v. Carbaugh, supra.

This is plainly not a case in which application of the regulatory scheme to a religious or political organization can be effected without implicating protected rights. See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (application of the minimum wage laws to a religious based entity does not infringe the First Amendment, because the laws in no manner implicate its religious beliefs or activities); SEC v. World Radio Mission, Inc., 544 F.2d 535, 537 (1976) (no First Amendment infringement from application of regulatory scheme to real estate development venture independent of protected activities). Rather, it presents the clear and present danger of massive government interference with, and an intolerable burden on, the actual and immediate exercise of core First Amendment

rights. If notes issued in exchange for loans to fund a civil rights march and lobbying fall within the scope of the Securities Act, then notes issued in connection with fundraising for a church sponsored religious pilgrimage must also fall within that scope, as must similar fundraising for political candidates or parties. If funds thus raised to sponsor a conference of this political movement[7] are subject to regulation by the SCC, then funds similarly raised to sponsor a religious conference, or a conference of any political movement or party are subject to such the same regulation. And such regulatory requirements, and their significant burden on First Amendment activities, exist before and irrespective of any allegations of fraud.

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[7] See, App.43b-45b.

If the Virginia Securities Act may be so applied, then the federal Securities Act, as well as comparable state statutes, are subject to similar application, since their essential provisions are the same. Petitioners' convictions, therefore, portend the wholesale intrusion of every state government, as well as the federal government, into the fundraising activities of political and religious organizations, no matter how integrally related that fundraising is with the core First Amendment activities in which those organizations are involved. Indeed, at least three other state courts have held that these very notes are securities under its statute, albeit in the context of a civil proceeding. See, Caucus Distributors, Inc. v. Comm. of Commerce, 422 N.W.2d 264, 270-72 (Minn. App.), cert. denied, 488 U.S. 1006 (1988); Caucus

Distributors, Inc. v. Maryland Securities Comm'n, 320 Md. 313, 577 A.2d 783 (1990); Caucus Distributors, Inc. v. State, 793 P.2d 1048 (Alaska 1990). Those activities will, therefore, be subject to inconsistent regulation and rulings by the various enforcement agencies, creating yet a further burden on the exercise of First Amendment rights. Given the fact that the substantial burden imposed on First Amendment freedoms by the decisions of the Virginia courts may well recur under comparable state and federal statutes, review by this Court is appropriate. See, Simon & Schuster v. Crime Victims Bd., 116 L.Ed.2d at 486.

III. THE PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY BECAUSE THE TRIAL JUDGE, ALTHOUGH HE DID NOT KNOW THE SCOPE OF THE POTENTIALLY INFLAMMATORY PUBLICITY TO WHICH VENIREPERSONS HAD BEEN EXPOSED, REFUSED TO CONDUCT CONTENT BASED VOIR DIRE.

An accused has a fundamental right to

an impartial jury. Irvin v. Dowd, 366 U.S. 717, 721 (1961). "Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 111 S.Ct. 1899, 114 L.Ed.2d 493, 509 (1991). While peremptory challenges are not constitutionally mandated, the underlying right to an impartial jury must not be undermined by ineffective voir dire. Irvin v. Dowd, 366 U.S. at 722-723. Similarly, while trial courts have broad discretion to decide if a venireman is qualified to serve as a juror, that discretion is limited by the constitutional mandate to impanel an impartial jury. Mu'Min v. Virginia, 114 L.Ed.2d at 508; Irvin v. Dowd, 366 U.S. at 722.

In cases involving extreme and highly

inflammatory publicity and prosecutorial interference and misconduct, specialized measures, including content questioning, are required from the court in voir dire to ensure impartiality. In such cases, content questioning provides the only reliable means for determining the true exposure of jurors to publicity and improper prosecutorial conduct. In turn, only with accurate knowledge of that exposure can a court evaluate a juror's ability to remain impartial based not only on that juror's assurances, but on all relevant information, including the potentially corruptive influence of prosecutorial misconduct.

In Mu'Min, this Court held that the refusal to allow content questioning did not render the trial fundamentally unfair in light of the type and extent of publicity surrounding the defendant's

trial. Mu'Min v. Virginia, 114 L.Ed.2d at 506. Justice O'Connor's concurring opinion, however, recognized that an exception to that general rule might exist which would require content based voir dire. Mu'Min v. Virginia, 114 L.Ed.2d at 510 (O'Connor, J., concurring).

Justice O'Connor, who joined in the 5-4 majority opinion, specifically restated her concurring opinion on the fact that the trial judge in Mu'Min had been fully exposed to all of the allegedly prejudicial information that might have been seen or heard by jurors. Mu'Min v. Virginia, 114 L.Ed.2d at 510. Thus, although the dissent argued that the trial judge should have done more to determine the extent of jurors' exposure, in light of the judge's full grasp of the relevant press coverage his decision to accept the jurors' own assurances of impartiality was

held to be reasonable. The majority argued more generally that the wide discretion granted to trial judges in conducting voir dire rested in large part on the judge's connection to the locality and "his own perception of the depth and extent of the news stories that might influence a juror." Mu'Min v. Virginia, 114 L.Ed.2d at 507. Mu'Min, however, did not ultimately resolve the question of whether the constitution requires content based questioning under different circumstances, where the publicity is inflammatory, rather than merely factual, national in scope, rather than merely local, unknown in its full extent and content by the trial judge, and engendered in large measure by the active participation of the prosecutor and law enforcement agents.

In connection with the prosecution of

petitioners and their co-defendants, the Attorney General or her assistants:[8]

> (1) made the conviction of these defendants a campaign issue, by promising the successful prosecution of these defendants in political speeches and in political literature that was distributed statewide, up to two months before the start of this trial (App. 83b-87b);
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> (2) appeared on a national news documentary program, less than two months before the start of this trial, alleging that petitioners "wind up taking every penny these people have (App. 76b-78b);"
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> (3) appeared on NBC Nightly News in May, 1990, alleging that money then being raised was being sent overseas to LaRouche's wife (App. 74b);

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[8] In a pointless attempt to create distance between the prosecution and the Attorney General, the Commonwealth at one point asserted that the Attorney General was not the prosecutor in this case. In fact, Mr. Russell, the courtroom prosecutor was an Assistant Attorney General, the assistant prosecutors were all Assistant Attorneys General, the support staff used was that of the Attorney General, the prosecutors' correspondence appeared on the stationary of the Attorney General, and the pleadings in the case were all issued from and sent to the Office of the Attorney General.

> (4) appeared on a national news program which strongly implied that $30,000,000 had been raised by fraud and that all 3,000 lenders had been defrauded, even though they knew that was untrue (App. 73b).
>
> (5) used, in political literature and speeches, and in their media statements, inflammatory language, including references to "bilking" the "elderly," "sweet-talk[ing] the elderly -- the infirm - -and the lonely," destroying the "last years" of "countless elderly women" and grinding down the "pride" of the elderly "under LaRouche's heel." (App. 83b-87b).

Comments from prosecutorial authorities are cloaked with an aura of importance and credibility. That fact, coupled with uninhibited access to the popular press, allowed the Attorney General to pander personal campaign agendas to the public by offering up a defendant in an already newsworthy case for sacrifice. "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial

is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Sheppard v. Maxwell, 384 U.S. 333, 363 (1960). "[T]he prosecutor makes a serious mistake, one that can not be too severely condemned" when she releases prejudicial information to the press. Allen v. U.S., 4 F.2d 688, 697 (7th Cir. 1924). To have the "prosecutor himself feed the press with evidence is to make the state itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper." Stroble v. California, 343 U.S. 181, 197 (1952), (Frankfurter, J., dissenting).

In commenting not only on the strength of her case, but in using the convictions obtained in previous cases to demonstrate the invincibility of her prosecutorial juggernaut against

petitioners, the Attorney General emphatically and unethically declared the defendants guilty before they were tried. See, In re Hansen, 584 P.2d 805 (Utah 1978); Mendez v. State, 362 S.W.2d 841, 842 (Tex. Crim. App. 1962); Sheppard v. Maxwell, 384 U.S. at 363; Virginia Code of Professional Responsibility, Disciplinary Rule 7-106. (App. 88b). In making pretrial comments on the heinousness of the crime, the prosecutor causes the government to default on its obligation in a criminal prosecution to see that justice is done. Commonwealth v. Pierce, 303 A.2d 209, 214-215 (Pa.), cert. den. 414 U.S. 878 (1973), citing Berger v. United States, 295 U.S. 78, 88 (1935); also, U.S. v. Stanford, 589 F.2d 285, 298 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964), cert. denied, 380 U.S. 987

(1965). Furthermore, by making pre-trial campaign promises regarding the prosecution of the accused, the Attorney General engaged in prohibited conduct.[9] State v. Hohman, 420 A.2d 852 (Vt. 1980).

The collective result of this behavior was to make a mockery of the trial process and petitioners' right to a fair and impartial jury. The extent and content of the prosecutorial manipulation of the press outlined above, when combined with the fact that press coverage was already national in scope, resulted in a publicity scenario so prejudicial as to

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[9] In the Court of Appeals, petitioners', with the permission of the Court, expanded the record with the report of federal agents involved in the planning of the state-federal raid on LaRouche headquarters, which reflected their opinion that the Attorney General was more concerned with immediate personal political gain than with the safety of the officers involved in the raid. (App.) **fbi excerpts**

require specialized measures by the trial court to ensure a fair trial. That is particularly so since, in Virginia, the jury fixes the sentence. See, Hirschkop v. Snead, 594 F.2d 356, 367, n.12 (4th Cir. 1979). The constitutional imperative for such specialized measures was not lessened by this Court's decision in Mu'Min.

In petitioners' case, no such measures were taken, the voir dire was constitutionally deficient, and, as a direct result, they were denied a fair trial by an impartial jury. "'Adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.'" Mu'Min v. Virginia, 114 L.Ed.2d at 508, quoting Patton v. Yount, 467 U.S. 1025, 1031 (1984). Under the circumstances that existed in this case, effective voir dire

was essential to safeguard the accused's right to an impartial jury, a right which this Court has recognized to be vulnerable to corruption by media and improper prosecutorial interference, which was, in fact, so corrupted. See, Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 352 (1965); Sheppard v. Maxwell, supra.

The Alabama Court of Criminal Appeals has held that Mu'Min did not foreclose a requirement of individual voir dire where publicity was so extensive and of a type that jurors' assurances of impartiality could not be accepted at face value. Brown v. State, 571 So.2d 345 (Ala. Crim. App. 1990), aff'd on remand, 586 So.2d 991 (1991). In that case, the prosecutor had referred to the case as "one of the most graphically horrible . . . we've had since I've been a D.A.," and said that "if any

case called for the electric chair, Brown's does." 571 So.2d at 350-51. A police chief called the accused "extremely dangerous" and a "psychopathic killer who killed for the pleasure of it." Id. These and other comments fueled the prejudicial effect of the already extensive media coverage and mandated individual and intensive voir dire to ensure a fair and impartial jury. Id. The Georgia Supreme Court has interpreted Mu'Min similarly. See. Tyree v. State, 418 S.E.2d 16 (Ga. 1992) (requiring examination of voir dire where extensive publicity was compounded by prosecutor's inflammatory statements as to his intent to "kill" the defendant.) Id. at 17.

Finally, two federal courts have recognized that, while the exception was not reached under the facts of the cases before them, a prosecutor's statements to

the media could have a prejudicial effect so severe that more specialized or extensive voir dire would be required. See, Solomon v. Commissioner of Correctional Services, 786 F.Supp. 218 (E.D.N.Y. 1992) (prosecutor's comments not prejudicial where venirepersons had not seen his statements broadcasted and otherwise extensive voir dire shielded against prejudicial effect of publicity); Rock v. Zimmerman, 959 F.2d 1237 (3rd Cir. 1991), cert. denied, 112 S.Ct. 3036 (1992) (publicity involved was not unfair or sensationalistic, nor the result of police or prosecutorial initiative). Other federal decisions citing Mu'Min have specifically concluded that the brevity and factual accuracy of publicity, and often the lapse of time between publication and jury selection, supported the trial court's assertion of discretion.

See, U.S.v. Greer, 968 F.2d 433 (5th Cir. 1992); Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991); Deel v. Jago, 967 F.2d 1079 (6th Cir. 1992); Britz v. Thieret, 940 F.2d 226 (7th Cir. 1991). Thus, the majority of courts have not read Mu'Min as foreclosing an inquiry into the amount and type of publicity nor the voir dire conducted in order to evaluate claims of manifest error. Nor have they presumed Mu'Min to hold that the adequacy of voir dire, including use of content questioning, could not be challenged in excessive publicity cases, especially where the inflammatory coverage has been precipitated by the prosecutorial team. Thus, the decision of the Virginia courts in petitioners' case is plainly at odds with those of several state appellate courts and federal courts. This court should grant the petition to resolve this

conflict and to set the parameters of the exception to the general rule set forth in Mu'Min.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that a writ of certiorari issue to review the judgment of the Virginia Supreme Court entered in the above-entitled proceedings.

Respectfully submitted,

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